Supreme Court, U.S.
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(2)

No. 00-396

In the
SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, ***Petitioner***

v.

JOE ELTON NIXON, ***Respondent***

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

JONATHAN LANG
Counsel of Record
Attorney for Respondent Joe Elton Nixon
305 West 103rd Street
New York, NY 10025
212-932-0881

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REASONS FOR DENYING THE WRIT

The decision below does nothing more than remand the case to the trial court for a hearing sufficient for the Florida Supreme Court to determine the very question that Petitioner would have this Court review. Regardless of whether this Court should ever reach the merits of this case, it would certainly be premature for it to do so now.

The Petition seeks review of the Florida Supreme Court's decision ordering an evidentiary hearing on Respondent's claim of ineffective assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984). The claim is based on trial counsel's concession of guilt during the guilt phase of Respondent's capital trial.

Respondent initially asserted the claim on direct appeal, and the Florida Supreme Court twice remanded the case to the trial court "for a hearing to determine whether Nixon was informed of the strategy to concede guilt and seek leniency." *Nixon v. State*, 572 So.2d 1336, 1339 (Fla. 1990), *cert. denied*, 502 U.S. 854 (1991). Issues involving the attorney-client privilege, however, limited the information adduced at the two hearings on remand. The Florida Supreme Court observed:

> [T]he state's examination of Mr. Corin [defense counsel] was extremely limited due to his refusal to testify concerning matters not already addressed during his testimony for the defense absent Nixon's waiver of the attorney-client privilege. Nixon refused to waive the privilege and the state was unable to fully examine Mr. Corin.

Id. at 1340.

As a result of the shortened scope of the evidentiary hearings on remand from the direct appeal, the Florida Supreme Court eventually deferred ruling on the *Cronic* claim until that claim could be more fully developed in a state postconviction proceeding, at which the attorney-client privilege would not impede examination of trial counsel:

> We recognize the confusion resulting from our remand for these atypical proceedings and decline to dispose of this claim on the present state of the record which we view as less than complete. Accordingly, we do so without prejudice to raise the issue in a later motion to vacate pursuant to Florida Rule of Criminal Procedure 3.850.

Id. (footnote omitted).

Since the Florida Supreme Court found the record "less than complete" and suggested that Nixon assert the ineffective assistance claim in Rule 3.850 proceedings, it should have followed that the state trial court would hold an evidentiary hearing to develop an appropriate record on the issue when Respondent raised it, as instructed, in state postconviction proceedings. However, heedless of the opinion on direct appeal, the state trial judge denied postconviction relief without taking any evidence, whereupon the Florida Supreme Court rendered the unremarkable decision below, saying:

> Thus, the dispositive issue in this case is whether Nixon gave his consent to his trial counsel to concede guilt during the guilt phase of the trial. Because Nixon previously invoked the attorney-client privilege, the 1990 Court was unable to get the answer to this question. Essentially, the 1990 Court issued an invitation to Nixon to raise this issue again in his

> 3.850 motion. Implicit within that invitation was that the postconviction circuit court conduct another evidentiary hearing, without risk of the attorney-client privilege, to determine whether Nixon consented to the strategy. Despite this, the circuit court in the present postconviction motion refused to grant an evidentiary hearing, and this Court still does not have the answer that it has been seeking for the last eleven years. Therefore, we remand this case for an evidentiary hearing on this issue. Due process demands this result.

Nixon v. Singletary, 758 So.2d 618, 624 (Fla. 2000).

With selected quotations from previous testimony of trial counsel, Petitioner suggests that the record thus far establishes that Nixon was aware that his lawyer would concede his guilt and that that awareness, without more, constitutes adequate consent to trial counsel's approach to the case. Thus, Petitioner argues that no hearing is required. See Petition at 3 and 24. However, the record is far from clear on the critical point regarding Respondent's consent, which, of course, is the very point that the Florida Supreme Court wants cleared up. Consider, for example, the following testimony of trial counsel on the remand to the trial court from the direct appeal, at the same hearing from which Petitioner draws its sources:

> Q When you told him [Nixon] how you were going to approach his case, did he affirmatively agree for you to do it that way?
>
> A I have to phrase my answer as close to the truth as possible, so probably the best answer is, he did not.

Supplemental Record on Direct Appeal at 30.

In addition, other record evidence supports the likelihood that Nixon, by his conduct and words, rejected his lawyer's strategy of conceding guilt.[1] Should the Florida courts find that Nixon rejected this strategy, relief would be warranted without the need to determine whether per se prejudice arises in the context of silent acquiescence. In any event, pending the hearing ordered by the Florida Supreme Court, the issue of Nixon's consent to the concession of guilt remains open.[2]

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[1] Nixon was absent when trial counsel made the concessions (see *Nixon v. Singletary*, 758 So.2d at 620, n.3), an absence that bespeaks a great divide between client and counsel. Other evidence confirms the disconnect. For example, two months before trial Nixon had written an incoherent letter to his attorney that appeared to demonstrate a severe mental imbalance. See *Id.* at 628-29 (Anstead, specially concurring). Moreover, contemporaneous eyewitness accounts indicate that Nixon expressed strenuous objections to the concessions of guilt. As a local newspaper article reported, "'[Nixon] was using profanity and was very vehement in his refusal to go in the courtroom,' said [Sheriff's Deputy] Schleich. 'He wasn't going to go, after reading in the paper that his lawyer said he was guilty.'" *Tallahassee Democrat*, July 20, 1985, p. 1; 3.850 Record on Appeal, 457; 3.850 Motion at 52, n. 12.

[2] Petitioner alludes to *Roe v. Flores-Ortega*, 120 S.Ct 1029 (2000), in trying to forestall the hearing ordered by the Florida Supreme Court. Petition at 24-25. Yet by noting that counsel's conduct "must be evaluated under all of the circumstances" (*id.* at 25), Petitioner concedes that *Flores-Ortega* itself contemplates an inquiry like the one ordered here so that the Florida court may determine the scope of the client's consent to the strategy employed by counsel. Cf. *Flores-Ortega*, 120 S.Ct. at 1035 ("The question whether counsel has performed deficiently. . . is best answered by first asking. . . whether counsel in fact consulted with the defendant about an appeal.").

However the Florida Supreme Court may eventually decide the merits of this case after that court obtains the kind of clear and full factual record that it believes it needs to have as the basis for a considered decision on the merits, its present order simply seeks to obtain such a record and to correct the trial court's inexplicable refusal to provide one. The order that Petitioner wants this Court to review is not the sort of order that this Court sits to review, nor does this case present a proper record upon which this Court should consider the question presented. Simply put, Supreme Court review is not appropriate.

CONCLUSION

For the foregoing reasons, the Court should deny the Petition.

Dated: September 28, 2000

Respectfully submitted,

JONATHAN LANG
Counsel of Record
Attorney for Respondent, Joe Elton Nixon
305 West 103rd Street
New York, NY 10025
212-932-0881